89-330

No. ______

In The

Supreme Court of the United States

October Term, 1989

IRVING J. ROSENBAUM,
Cross-Petitioner,
vs.
DAVIS IRON WORKS, INC.,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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58 pp

QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS IMPROPERLY APPLY THE FIVE FACTORS TO BE CONSIDERED WHEN IT RULED THAT THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO CROSS-PETITIONER PURSUANT TO 29 U.S.C. § 1132(g)(1)?

PARTIES TO THE PROCEEDINGS BELOW

Cross-Petitioner is Irving J. Rosenbaum.

Cross-Respondent is Davis Iron Works, Inc., a Michigan corporation.

The following are third-party defendants interpleaded by Cross-Respondent in the District Court; they were not involved in the appeal to the United States Court of Appeals for the Sixth Crcuit, whose decision Cross-Petitioner herein requests be reviewed:

Sheldon D. Eizen

National Administrative Services of Michigan, Inc.

Austin A. Kanter

Austin A. Kanter, C. L. U. & Associates, Inc.

Jack L. Rosen

Jack L. Rosen, P.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO[S].

Cases:

PAGE NO[S].

Statutes:

Court Rules:

No. ______

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cross-Petitioner, IRVING J. ROSENBAUM, respectfully requests that a Writ of Certiorari issue to review the portion of the decision of the United States Court of Appeals for the Sixth Circuit which vacated the award of attorney's fees.

OPINIONS AND ORDERS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit (decided April 19, 1989), affirming in part and reversing in part the judgment entered by the District Court, is attached as Appendix A.

The Amended Memorandum Opinion and Order of the District Court, 669 F.Supp. 813 (E.D. Mich. 1987) is attached as Appendix B.

The Judgment of the District Court (September 21, 1987) is attached as Appendix C.

The Order Determining Amount of Attorney Fee Award entered by the District Court (December 7, 1987) is attached as Appendix D.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1989. Cross-Respondent herein filed a Petition for a Writ of Certiorari from that decision which was received by Cross-Petitioner herein on July 19, 1989. This Cross-Petition for a Writ of Certiorari is filed under Supreme Court Rule 19.5, upon which Cross-Petitioner relies. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statute which is set out verbatim herein:

29 U.S.C. § 1132(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

Cross-Respondent DAVIS IRON WORKS, INC. (hereinafter referred to as "DAVIS"), is a Michigan corporation. Since the early 1960s until 1984, Cross-Petitioner IRVING J. ROSENBAUM (hereinafter referred to as "ROSENBAUM") had been the majority shareholder and the president of DAVIS.

In 1967, DAVIS established a defined benefit pension plan which was entitled the "Davis Iron Works, Inc. Pension Trust" (hereinafter referred to as the "Plan"). The Plan was qualified for favorable tax treatment with the Internal Revenue Service in 1968.

Under the 1967 Plan, DAVIS agreed to purchase annuity contracts on the eligible employees which would create a monthly pension upon the employee's retirement. The Plan contained a section which provided that DAVIS could not amend the Plan to cause funds contributed to the Plan or assets of the Plan to revert to the employer (R. 25: Exhibit A, § 12.1(c)).

Following the enactment of the Employer Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, DAVIS amended and restated the Plan in its entirety by a document dated June 1, 1979. The Restated Plan deleted the non-reversion section of the Original Plan. Instead, the Restated Plan provided that if upon termination of the Plan there were assets remaining after payment of all accrued benefits, the assets would revert to DAVIS. ROSENBAUM was also made the trustee of the Plan. DAVIS was designated as the Plan's Administrator (R. 25: Exhibit B, § 3.2, 22.2(E)).

On June 8, 1984, ROSENBAUM retired as an employee of DAVIS. He resigned as president and director of DAVIS and as the Trustee of the Plan. DAVIS entered into a Stock Redemption Agreement with ROSENBAUM to purchase all of his shares in the corporation.

Upon ROSENBAUM's retirement, his vested and accrued benefit in the Plan was calculated. Pursuant to an amendment to the terms of the Plan, ROSENBAUM elected to have the actuarial equivalent of his accrued benefit transferred to a separate account within the Plan to be held by the Plan until ROSENBAUM either

decided to withdraw his benefits, or he reached age 65, whichever occurred first. While ROSENBAUM's benefit was held by the Plan, it continued to be invested and earned interest attributable to ROSENBAUM's account.

On October 5, 1984, DAVIS elected to terminate the Plan. On the date of termination, ROSENBAUM's benefit was still being held by the Plan. On March 24, 1985, before the benefits were paid to the participants, DAVIS notified ROSENBAUM that as a result of certain errors made by the actuaries, the Plan had miscalculated ROSENBAUM's benefit. ROSENBAUM was informed that a portion of his benefit being held in the segregated asset account would have to be returned to the general Plan.

As a result of the error, DAVIS recalculated and reduced ROSENBAUM's actual accrued benefit. However, ROSENBAUM and DAVIS disagreed as to the allocation of the interest that had been earned on the overstated benefit. As a result, ROSENBAUM and DAVIS entered into an Agreement on November 1, 1985 to allocate the assets and interest that would make up ROSENBAUM's accrued benefit from the Plan (R. 25: Exhibit E). Commensurate with the execution of the Agreement, the Plan paid ROSENBAUM his accrued pension benefit.

When ROSENBAUM returned a portion of the monies that had been held in his segregated asset account to the Plan, the Plan held more assets than it needed to satisfy its obligations to the participants. After payment of all accrued benefits and administrative expenses, the Plan had an excess of $63,868.00. Pursuant to ¶ 22.2(E) of the Restated Plan, the excess assets were returned to DAVIS.

In late 1986, ROSENBAUM was informed of the recent decision of the Sixth Circuit Court of Appeals in *Bryant* v. *International Fruit Products Company, Inc.*,

793 F.2d 118 (6th Cir. 1986), *cert denied* 479 U.S. 986, 107 S.Ct. 576 (1986). Under *Bryant,* a pension plan that prohibits the reversion of contributions and plan assets to the employer upon termination of the Plan cannot be amended to provide for a reversion to the employer. Believing that *Bryant* controlled the factual situation regarding the DAVIS Plan, ROSENBAUM requested that DAVIS pay him his proportionate share of the reversion pursuant to *Bryant.* DAVIS refused to do so, stating that it did not believe *Bryant* to be controlling.

ROSENBAUM filed a lawsuit against DAVIS in the United States District Court for the Eastern District of Michigan on January 22, 1987. Federal jurisdiction was invoked under 29 U.S.C. § 1132(a)(2). ROSENBAUM filed a motion for summary judgment under Fed.R.Civ.P. 56(a). Relying on *Bryant,* the District Court granted ROSENBAUM's motion. The court ordered DAVIS to return the reversion to the Plan and awarded ROSENBAUM a portion of the reversion. In addition, the District Court awarded ROSENBAUM attorney's fees under 29 U.S.C. § 1132(g) (R. 80: Amended Memorandum Opinion and Order, pp. 16-17). After proof of the hours expended, the District Court ordered DAVIS to pay ROSENBAUM the sum of $9,862.50 in attorney's fees (R. 123: Order Determining Amount of Attorney Fee Award).

DAVIS filed an appeal from the District Court's judgment. On April 19, 1989, in an unpublished opinion, the Sixth Circuit Court of Appeals affirmed the judgment of the court below, with the exception of the award of attorney's fees. The Sixth Circuit vacated the award of attorney's fees.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY APPLIED THE FIVE FACTORS TO BE CONSIDERED WHEN IT RULED THAT THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO CROSS-PETITIONER PURSUANT TO 29 U.S.C. § 1132(g)(1).

In its Memorandum Opinion and Order, the District Court below granted ROSENBAUM's request for reasonable attorney's fees pursuant to 29 U.S.C. § 1132(g)(1). The lower court applied the five factors to be considered in awarding attorney's fees in an ERISA case:

(1) the degree of the opposing party's culpability or bad faith;

(2) the ability of the opposing party to satisfy an award of attorney's fees;

(3) whether an award of fees against the opposing party would deter others from acting in similar circumstances;

(4) whether the party requesting fees sought to benefit all participants and beneficiaries of a multi-employer plan or to resolve a significant legal question; and

(5) the relative merits of the parties' positions. *Central States Pension Fund* v. *888 Corporation*, 813 F.2d 760, 767 (6th Cir. 1987).

The court applied each of these factors to the case at bar, and in each instance determined that ROSENBAUM was entitled to an award of fees.

On appeal, the Sixth Circuit Court of Appeals vacated the award of attorney's fees. After acknowledging that the lower court's ruling could only be overturned if there was an abuse of discretion, and after citing the

same five factors cited above, the Sixth Circuit disagreed with the lower court's decision. The Sixth Circuit apparently relied on only two of the five factors in reaching its decision. It ruled that due to the "unsettled" issues in the case, neither party could be said either to be acting in bad faith or to have an obviously more meritorious position than the other. The Court then affirmed the judgment in favor of ROSENBAUM in all other respects, on each issue raised by DAVIS.

ROSENBAUM contends that the decision of the Sixth Circuit with regard to attorney's fees is in conflict with the Eighth and Ninth Circuits, in the application of the five factors to be considered. In addition, the Sixth Circuit departed from the abuse of discretion standard applicable in reviewing an award of attorney's fees under 29 U.S.C. § 1132(g)(1). Both of these are valid reasons for a review on writ of certiorari under Supreme Court Rule 17.1.

The standard of review is not in dispute. The Court of Appeals can reverse a decision regarding attorney fees only upon an abuse of discretion, which the court will not find unless the record clearly supports such a conclusion. *Short* v. *Central States, Southeast and Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984). As stated in *Gordon* v. *United States Steel Corporation*, 724 F.2d 106 (10th Cir. 1983):

> To hold that the district court abused its discretion, we must have a definite conviction that the court, upon weighing relevant factors, clearly erred in its judgment. *Gordon, id* at 108.

Although the court below acknowledged the standard of review, its decision does not lead one to believe that the standard was properly applied, nor does the record support its decision.

The Ninth Circuit has developed a body of law that describes the analysis that courts are to apply to a request for attorney's fees in ERISA cases. In *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), the Court states that ERISA is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans. The *Smith* Court notes that the Eighth Circuit has held that if a plan participant prevails in his suit under 29 U.S.C. § 1132, he should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. See *Landio* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980), quoting this Court's opinion in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

The Ninth Circuit in *Smith* states that as in cases brought under 42 U.S.C. § 1988, ERISA employee plaintiffs should be entitled to a reasonable attorney's fee "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," quoting this Court's opinion in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983).

The *Smith* Court requires that the five factors set forth in *Central States Pension Fund* v. *888 Corp.*, *supra*, be applied with the remedial purposes of ERISA in mind. ROSENBAUM contends that the Sixth Circuit has failed to do this.

The District Court below felt that DAVIS had exhibited bad faith when it refused to return the surplus assets to the Plan, after ROSENBAUM demanded that DAVIS do so under the authority of the *Bryant* decision. On appeal, the Sixth Circuit, despite its ruling that "this case is controlled by *Bryant*," decided that the

issues were so unsettled that neither party could be said to be acting in bad faith.

The Sixth Circuit's decision appears to be primarily based on this one factor. No one of the five factors is necessarily decisive, and some may not be pertinent in a given case. *Smith, supra* at 590; *Gray* v. *New England Telephone & Telegraph Company,* 792 F.2d 251 (1st Cir. 1986). The Ninth Circuit has held that 29 U.S.C. § 1132(g) does not require the participant to show bad faith on the part of the plan in order to recover attorney's fees. Bad faith is only one factor to be considered among several. A refusal to award attorney's fees on this ground is a mistake of the law applicable. *Terpinas* v. *Seafarer's International Union of North America, Pacific District,* 722 F.2d 1445 (9th Cir. 1984). In *Smith* v. *CMTA-IAM, supra,* the Court held that where there was no bad faith on either side, this factor should not have been considered decisive. *Smith, supra,* at 590.

The District Court below found the next three factors to be in favor of ROSENBAUM. DAVIS did not dispute that it would be unable to satisfy the award of fees. The lower court felt that an award of fees would deter other similarly situated employers from terminating pension plans in order to obtain surplus assets that would rightfully belong to employees under the plan. The lower court also noted that as a result of ROSENBAUM's action and judgment, the remaining plan participants would benefit by the amount that each was entitled to receive from the reversion. The court also stated that the legal question resolved in the litigation was a significant one.

The Sixth Circuit below discussed none of these factors. From the record, the Court of Appeals made no effort to weigh these factors against the first factor of bad faith.

Finally, the District Court below found ROSENBAUM's legal position to be far more meritorious than DAVIS'. The total resolution of each and every issue in favor of ROSENBAUM supports the lower court's finding. However, inexplicably, the Sixth Circuit below felt that neither party had a more meritorious position then the other. Yet, the Sixth Circuit affirmed the judgment in all respects on each issue, with the exception of the attorney's fees. The record clearly does not support the finding by the Sixth Circuit with regard to this factor.

The Ninth Circuit stated that the fifth factor "is, in the final analysis, the result obtained by the plaintiff." *Smith, supra* at 590. ROSENBAUM could not have been any more successful on the merits. If the relative positions were as close as the Sixth Circuit believed, then the factor should have been considered a draw, and not a basis for *reversing* the lower court's award of fees.

It is clear that the Sixth Circuit did not apply the general rule that is followed by the Ninth Circuit in weighing the five factors to be considered in a 29 U.S.C. § 1132(g) determination. As set forth in *McConnell* v. *MEBA Medical & Benefits Plan*, 778 F.2d 521, 525 (9th Cir. 1985):

> Absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant.

The Court went on to hold that if the lower court cites no special circumstances which would make an award of fees unjust, there would be an abuse of discretion in denying fees. The same rule is followed in *Smith* v. *Retired Fund Trust*, 857 F.2d 587 (9th Cir. 1988), where the Court held that even in the absence of bad faith, the other relevant factors would justify an award. Complete success is indicative of the relative merits of each party's position.

ROSENBAUM submits that the Sixth Circuit either failed to weigh all of the relevant factors, or reached conclusions that were not supported by the record. If the rule as set forth in the Ninth Circuit is applied, ROSENBAUM, as the prevailing party, is entitled to fees unless the five factors reveal special circumstances that would militate against an award. Clearly, the Sixth Circuit did not apply the rule used by the Ninth Circuit.

Even if only the five factors are applied, the Sixth Circuit only considered two of the five factors and decided that there was no advantage to either party. Under the standard of review for discretionary acts, this was totally insufficient to justify a reversal of the District Court's award of attorney's fees to ROSENBAUM under 29 U.S.C. § 1132(g).

For these reasons, Cross-Petitioner IRVING J. ROSENBAUM respectfully requests that this Honorable Court grant a review on writ of certiorari of the portion of the decision of the United States Court of Appeals for the Sixth Circuit that vacates the award of attorney's fees ordered by the District Court for the Eastern District of Michigan.

Respectfully submitted,

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ROSENBAUM & BAKER, P.C.

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Dated: August 15, 1989

APPENDICES TO CROSS-PETITION FOR CERTIORARI

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APPENDIX A

OPINION
NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed April 19, 1989)

(IRVING J. ROSENBAUM, Plaintiff-Appellee, v. DAVIS IRON WORKS, Defendant-Appellant — No. 88-1245; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: **MILBURN** and **BOGGS**, Circuit Judges; and **CONTIE**, Senior Circuit Judge.

PER CURIAM.

Appellant Davis Iron Works (Davis) appeals the decision of the district court granting summary judgment to plaintiff-appellee Irving J. Rosenbaum. Rosenbaum sued to recover, under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, a pro rata share of the overfunding of Davis's defined benefit pension plan. The court below awarded Rosenbaum a pro rata share of $63,868, amounting to $43,832.07. Rosenbaum was also awarded attorney's fees, amounting to approximately $10,000. Except for the award of attorney's fees, we affirm the judgment entered by the district court.

I

This dispute concerns two pension plans implemented by Davis. From the early 1960s until his resignation on June 8, 1984, Rosenbaum was the majority stockholder and president of Davis. In 1967, under the direction of Rosenbaum, Davis established a pension plan (Original Plan) to cover its eligible non-union employees. Under this plan, Davis agreed to purchase annuity contracts for the covered employees. These contracts would produce a defined monthly pension upon the employee's retirement. The plan stated that "All amounts contributed by the Employer to the Trustee shall represent irrevocable contributions of the Employer to this trust."

While the plan stated that Davis could amend the plan at any time, the plan also stated that "No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries." It also stated that "No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer." Finally, the plan provided that "Upon termination of the trust any assets of the trust, other than contracts issued on the lives of participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants."

In 1979, after the passage of ERISA, the Original Plan was reframed in its entirety in order to comply with that legislation. This Amended Plan was again established under the direction of Rosenbaum, and he became the plan's trustee. Subsection 22.2(E) of the plan provided that "In the event there are assets of the Trust Fund remaining after the allocation under Subsection 22.2(D), the remaining assets shall be returned to the Corporation."

On June 8, 1984, Rosenbaum retired from his position as president of the company and trustee of the plan. Davis and Rosenbaum signed a stock redemption agreement in which Davis purchased Rosenbaum's 75% share of the company's stock. On the date of the signing of this agreement, both sides executed a mutual release of claims concerning the agreement. Rosenbaum elected, as permitted under the plan, to have the cash equivalent of his accrued benefits in the Plan transferred to a separate account to be held by the Plan until he decided to withdraw them. The money in this account was to be invested as directed by Rosenbaum, and the proceeds of the investments were to go into the account.

On October 5, 1984, Davis terminated the plan. On March 24, 1985, before the Plan participants were paid, Davis notified Rosenbaum that the Plan had miscalculated his benefits and overpaid his account by $65,324. Davis insisted that Rosenbaum return the excess to the Plan. Rosenbaum disputed the amount of the overpayment. On November 1, 1985, Rosenbaum, Davis, and the Plan settled the dispute and signed an agreement defining the plaintiff's benefits (the "release"). In consideration for Davis's agreement to a pay a compromise amount, Rosenbaum agreed to release his claims against Davis, specifically exempting a claim against Davis for an increased redemption price for his stock due to an overfunding of the plan. At this point, both parties knew there was some overfunding of the plan, but neither knew the extent of the overfunding.

On November 21, 1985, Davis received the first portion of the excess assets of the plan. On December 24, 1985, Davis received the balance of the assets pursuant to Subsection 22.2(E) of the Amended Plan. In July 1986, Rosenbaum filed a claim in state court alleging that his redeemed shares were undervalued to the extent

of 75% of the reversion. This claim was the one specifically reserved in the release. In January 1987, however, Rosenbaum filed this action asking for a pro rata share of the reversion. (The state court agreed to dismiss the stock redemption claim without prejudice.) Both sides in this action filed motions for summary judgment. In September 1987, the court below granted summary judgment to the plaintiff on his claim and also dismissed counterclaims filed by the defendant.[1] *Rosenbaum* v. *Davis Iron Works*, 669 F. Supp. 813 (E.D. Mich. 1987). This appeal followed.

II

Davis first contends that Rosenbaum lacks standing to maintain this action because he had already received all his benefits from the Plan before the residual assets were discovered. Davis argues that the segregation of Rosenbaum's assets from the Plan into a separate account constituted a constructive receipt of the benefits, disqualifying Rosenbaum from maintaining this suit. In support of this doctrine of constructive receipt, Davis looks to Federal tax law on when benefits received pursuant to ERISA pension plans are taxable.

In order to maintain an action under ERISA, one must be a considered a [*sic*] participant under the plan. 29 U.S.C. § 1002(7) defines a participant as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." A former employee whose accrued benefits under a plan have already been distributed in a lump sum is not "eligible

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[1] The dismissal of the counterclaims has not been appealed.

to receive a benefit" and thus is not a participant under ERISA. *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986).

Davis argues that, at the time of the reversion, Rosenbaum had already retired and received his benefits. The fact that he chose to keep his benefits in a segregated account maintained by the trust does not affect the fact that he already received his benefits. The account, while maintained by the trust, was invested at the direction of Rosenbaum. In order to receive his money, he had only to ask that the distribution be made. This control shows, according to Davis, that he constructively received his benefits.

Davis claims that the treatment of these benefits under Federal tax law supports its constructive receipt theory. Prior to 1981, § 402 of the Internal Revenue Code treated these benefits as being received for tax purposes. However, as Rosenbaum points out, this section was amended in 1981 to read that only benefits that are actually distributed are taxed. Davis claims that while the change in the law did allow the delay of taxation of benefits by pension recipients, this change did not mean that the recipient could delay the distribution of his benefits as long as he wants. The intention of the law was to allow recipients to tell the administrators of the pension plan when they wished their benefits distributed, and the benefits would be distributed at that later date. In the present case, Rosenbaum did not set any date that his assets were to be released; under the provisions of the plan, he could delay distribution as long as he wanted. Under this kind of scheme, Davis argues, Rosenbaum should be considered to have received his benefits.

Davis argues that if the law is not interpreted in this manner, a massive tax loophole will have been created that Congress did not intend to create. In any event, the issue here, Davis argues, is whether Rosenbaum should be accorded standing under ERISA to sue for a reversion of assets after he received all the benefits due him under the plan. Davis argues that it makes no sense to allow Rosenbaum standing in this case and not allow it to those people who received their benefits in a lump sum.

We are not persuaded. Even if Davis were correct as to the tax treatment of Rosenbaum's benefits, it would not be dispositive of the issue in this case. In any event, it is not at all clear that Davis is correct. The language of the statute seems to support Rosenbaum. Section 402(a)(1) of the IRS Code states, in pertinent part, that "the amount actually distributed to any distributee by an employees' trust . . . shall be taxable to him, in the year in which so distributed." It is undisputed that Rosenbaum's benefits were not distributed to him until November 1985, well after the termination of the plan. Thus, one can argue that, using Davis's own analogy, Rosenbaum had not yet received his benefits and was a participant in the fund.

In addition, it is our view that the *Kuntz* rule disallowing suits by non-participants is inapplicable in this case. In *Kuntz*, the plaintiff, who had clearly received his benefits, sought damages for a breach of fiduciary duty under ERISA. He, therefore, was not seeking a benefit from a plan, as a participant would, but rather was seeking monetary damages. In the present case, however, Rosenbaum is seeking a benefit under the plan, not damages for a violation of a fiduciary duty. Even someone who has ostensibly received all his benefits should be able to sue in a case such as this because the suit is for benefits the claimant was allegedly entitled to under the

plan. Any other ruling would allow plan administrators to take benefits from plan recipients and then become immune to suit by paying beneficiaries some of the benefits to which they were entitled, while falsely representing that the amount paid was the full amount of the benefits due.

This kind of analysis was approved in a recent decision by the Ninth Circuit, the court that decided *Kuntz*. In *Amalgamated Clothing & Textile Workers Union et al.* v. *Murdock et al.*, 861 F.2d 1406 (9th Cir. 1988), the court held that a plaintiff who had already received his benefits could maintain an equitable action for a breach of fiduciary duty. The court concluded: "A fiduciary should not be allowed to keep ill-gotten profits simply because plan participants and beneficiaries have been paid their actuarially vested plan benefits." *Id.* at 1418. This conclusion is also supported by the recent Supreme Court decision in *Firestone Tire and Rubber Co.* v. *Bruch*, 109 S.Ct. 948 (1989). In that case, the Court held that a plaintiff can be considered a participant under the act for purposes of maintaining an action against the plan administrator if he has a 'colorable claim' to benefits. *Id.* at 958. Thus, a plaintiff in this type of case should be treated as a participant if he has a colorable claim to benefits under the plan.[2] Rosenbaum clearly has such a claim. We therefore conclude that Rosenbaum should be treated as a participant and, hence, has standing to sue.

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[2] We note, as pointed out by the court below, that Davis itself considered Rosenbaum a participant in three corporate documents issued after the segregation of Rosenbaum's assets. Rosenbaum concedes that these documents do not estop Davis from maintaining he is not a participant, but they do at least rhetorically support his position.

III

Davis next argues that Rosenbaum is not eligible to receive benefits because he was not a participant as defined by the Original Plan at the time of the discovery of the residual assets. That plan required a participant to be a current employee. The Amended Plan, like ERISA, however, does not exclude a retired employee from being a participant.

Davis argues that if, as the district court held, the Amended Plan's provision that all residual assets go to Davis is inoperative, its definition of participant, at least as it pertains to the distribution of these assets, should be as well. Rosenbaum should not be able to enforce only those parts of each plan that suit his interest.

We reject this contention. The Original Plan allowed all amendments, except for changes to provisions concerning the distribution of surplus assets. The Amended Plan is thus perfectly valid; only the one amendment challenged is void. The rest of the plan, including the definition of participant, remains valid. Rosenbaum can mantain his suit.

IV

Davis next argues that the November 1, 1985 release of claims signed by Rosenbaum barred his claim. Davis contends that this release was a general waiver of all of Rosenbaum's claims concerning the residual assets of the Plan, with the exception of an action seeking an increased return for his redeemed stock based on the increased value of the shares due to the residual assets. The language of the release on which Davis relies reads: "In consideration of the agreements and undertakings of Davis and the Trust herein contained, Rosenbaum . . .

hereby irrevocably and unconditionally releases, acquits, and discharges Davis, the Trust . . . of and from any and all claims, actions, and causes of action, however and whenever arising, whether fixed, contingent, liquidated and/or unliquidated, which Rosenbaum . . . now ha[s], ever had or may hereafter have against the Releasees by virtue of Rosenbaum's relationship with the Trust in any and all capacities whatsoever at any time."

It would certainly appear, considering the language of the release, that Rosenbaum waived all claims, present and future, as to the trust. The court below, however, held that such a general waiver could not [*be*] upheld. It first cited 29 U.S.C. § 1110, which states in pertinent part: "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." The court held that this provision prevented it from enforcing any waiver as to future claims against the Plan.

Davis argues, however, that this section does not apply to voluntary releases. It cites two cases for support. The first case, *Arnulfo P. Sulit, Inc., et al.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), concerned an agreement to take ERISA plan claims to arbitration. The court ruled that § 1110 did not prevent this kind of agreement. *Id.* at 478. Davis also cites an unpublished opinion of this court, *Miller et al.* v. *General Motors Corp.*, No. 87-1493, (6th Cir., April 27, 1988), in which the panel held that an agreement to waive all employee rights under an employment contract, including benefits, in exchange for the opportunity to purchase stock did not violate § 1110.

These cases are inapposite. *Sulit* only concerned an agreement as to the forum in which claims should be adjudicated, not a release of the claims themselves. *Miller* concerned the waiver of rights under an employment contract, not the waiver of claims that the administrators of a plan violated their fiduciary duty to the plan. The present case, on the other hand, involves exactly the type of case § 1110 was meant to apply to, a waiver of claims of breach of fiduciary duty. The prohibition should apply.

The district court also held that because the waiver applied to future claims, there was a failure of consideration. Davis argues that there was clear consideration for the waiver in that Davis agreed to settle the dispute over the alleged overpayment to Rosenbaum by splitting the difference between each side's demands. The general waiver was the price Davis received in exchange for compromising its demands. In addition, Davis contends that the cause of action in the present case already existed at the time *of* the release in so much as Rosenbaum knew that there was an overfunding of the plan of some amount. He also knew that Davis, under the provisions of the Plan, intended to keep the reversion. His knowledge of these facts led him to reserve the redeemed stock action in the release, an action that would mean nothing if there was no overfunding. It is clear, then, Davis argues, that Rosenbaum intended to give up any claim in the residual assets.

We conclude, however, that it is clear that the release only applied to the claim concerning the overpayment of funds to him, not any future claims as to residual assets. Michigan law holds that a release covers only claims intended by the parties to be released and has no greater effect. *Auto-Owners Insurance Co.* v. *Higby,* 226 N.W.2d

580, 582 (Mich. App. 1975). Rosenbaum could not possibly have waived such a claim because at the time this court had not yet decided *Bryant* v. *Int'l Fruit Products Comp., Inc.,* 793 F.2d 118 (6th Cir. 1986), in which this court held for the first time that amendments like the one giving the residual assets to Davis were void. Up until this point, Rosenbaum had no cause to believe that the residual assets would not go to Davis under the Plan.

In addition, at the time of the release, Davis had not yet even calculated the amount of the residuals, much less taken possession of them. Thus, Rosenbaum could not have any cause of action at the time because up until the point at which Davis took the assets, Davis could have fulfilled its duty and returned the assets to the participants. It was not until December 24, 1985, when Davis paid itself the balance of the assets, that the cause of action accrued. Rosenbaum cannot be deemed to have waived this action on November 1. Finally, it should be pointed out that Rosenbaum would have been very foolish to waive a claim to over $50,000 for a settlement that netted him about $2,000. We hold that the release does not bar this claim.

V

Davis next contends that the provision of the Amended Plan allowing a reversion of surplus assets to the company was valid. The district court held that, under the interpretive principles established in *Bryant,* the Original Plan prohibited such an amendment. It found such a prohibition in the provisions of the plan that stated: "No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries" and that "No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the

Employer." Davis argues that the plan reviewed in *Bryant* is distinguishable from the one at issue here and that the Original Plan allows the amendment authorizing a reversion.

Davis bases its argument concerning the correct interpretation of the Original Plan on the structure of that plan. Davis points to the provisions of the Original Plan that define a contribution under the Plan. Davis argues that participants in the plan are entitled only to the specific amount of benefits discussed in the plan. The company is bound under the provisions of the plan to contribute enough money to provide those benefits. These contributions constitute the trust fund and are the funds which cannot revert back to the employer. Contributions in excess of those needed to generate the required benefits, however, are not part of the plan, are not made for the benefit of the participants, and should be returned to the employer. Thus, the prohibition against the reversion of contributions did not apply to the surplus assets claimed by Davis.

Davis finds support for this view in *In Re C.D. Moyer Company Trust Fund*, 441 F.Supp 1128 (E.D. Pa. 1977), where the court held that where the original plan stated it was "impossible, if any alteration, amendment or revocation be made . . . for any of the trust corpus or income to be diverted to or revert to either of the employers or to be used for any purpose other than the exclusive benefits of the participants," an amendment allowing surplus assets to revert to the employer was acceptable because such assets were not part of the trust funds to be paid to beneficiaries. *Id.* at 1131, 1132. Davis also cites *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). There the court held that a provision stating: "No part of the Fund . . . shall be withdrawn, assigned, or otherwise transferred in whole or in part" did not prohibit an

amendment allowing residual assets to be diverted to the company. *Id.* at 462, 465. The court reasoned that the "Fund" only included those monies that were to be paid as benefits, not surplus assets. *Id.* at 464. Davis contends that the plan here, as in *Moyer* and *Wilson*, prohibited only the transfer of funds that were to be paid out as benefits.

We conclude, however, as did the court below, that this case is controlled by *Bryant*. In that case, this court considered exactly the issue disputed here. The original plan in *Bryant* contained a provision reading: "In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust." *Bryant*, 793 F.2d at 120. In a second amended plan, the plan was amended to allow the distribution of the surplus assets to the company.

The court found the amendment void, holding that "this pension plan assured the participating employees that, once contributed, no money paid into the fund could ever be reclaimed by the company. . . . Even if a surplus from actuarial error might properly be considered not to be a part of the trust estate, nevertheless, the surplus assets did originate as 'contributions' to the trust." *Id.* at 123. The court was also impressed by the fact that the provision stated that under no circumstances, presumably including a surplus, could money revert to the employer. The court distinguished *Moyer* by saying the provision there referred only to the trust funds used for payment, not to the total contributions. *Wilson* can be distinguished on the same basis, as indeed the *Wilson* court did, when it discussed *Bryant*.

The provisions at issue in this case are similar to those in *Bryant*. The Original Plan referred to contributions, not the trust fund, and it also stated that no such funds shall ever revert to the employer. Davis attempts to distinguish *Bryant* by stating that it is not clear that the plan there was designed as was the plan here to eliminate surplus funds. Davis also argues that the *Bryant* plan refers not only to contributions, but also to the trust income and estate, making it clearer than is the case here that no income can be diverted. These attempts to distinguish *Bryant* are unpersuasive. We conclude that, following *Bryant*, the amendment is void.

VI

Davis also contends that Rosenbaum should be estopped from maintaining this claim because he should not be able to profit from his bad acts. Davis contends that if the Amended Plan's provisions are contrary to the law, Rosenbaum should not be able to profit from these errors because, as president and majority stockholder of Davis, he was responsible for that plan. Rosenbaum, Davis points out, stated in the stock redemption agreement signed when he resigned, that "the Company is not in default in any material respect under any contract to which it is a party." Rosenbaum, Davis contends, did not keep this promise.

Michigan law holds that estoppel arises where one by his acts, representations, or silence when he ought to speak, intentionallly or through culpable negligence induces another to believe in the existence of certain facts and that person justifiably relies on the existence of the assumed facts to his detriment. *Hastings Mutual Insurance Company* v. *Hartford Accident & Indemnity Company*, 352 N.W.2d 292, 295 (Mich. App. 1984). One

must have actual or constructive knowledge of the real facts in order for estoppel to exist. *Langschwager* v. *Pinney*, 88 N.W.2d 276 (Mich. 1958).

Davis contends that Rosenbaum negligently led Davis into amending the plan to its detriment. Davis relied on Rosenbaum's representations that the plan was valid in making contributions to the plan. Had Davis known that any surplus assets were to go to the employees and not the company, it might have been able to avoid making excess contributions. Rosenbaum, as an experienced businessman, must be deemed to have constructive knowledge of the law as it relates to his business. Davis concludes that Rosenbaum should not be able to profit from his questionable acts.

It is our view, however, that Rosenbaum was in no way negligent in making the plan. The amendment was made in 1979, several years before *Bryant* held that such amendments were void. Rosenbaum never meant to injure Davis and, in fact, Davis is not injured. It merely has to give up a windfall to its rightful owners. As to its argument that reliance on the plan's validity led to excess contributions, Davis has argued in this appeal that the plan was designed to limit excess contributions. It should not now be able to argue that in fact it was lulled into overfunding. Lastly, we note that the wrongful act here was not the amendment, but the reversion of the funds. If Davis had not chosen to take the funds, there would have been no violation of the law. Rosenbaum had every right to sue.

VII

Finally, Davis contends that the lower court erred in awarding Rosenbaum fees and denying its motion for fees. The decision of the district court concerning the

grant of fees in ERISA cases should not be disturbed unless there is an abuse of discretion. *Operating Engineers Pension Trust* v. *Beck Engineering & Surveying Co.*, 746 F.2d 557, 569 (9th Cir. 1984). The criteria that a court should apply in deciding whether to award fees are laid out in *Central States Pension Fund* v. *888 Corp.*, 813 F.2d 760, 767 (6th Cir. 1987). They are: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorney's fees; (3) whether an award of fees against the opposing party would deter others from acting in similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of a multiemployer plan or to resolve a significant legal question; and (5) the relative merits of the parties' positions.

The court below held that the grant of fees was warranted because, first, Davis acted in disregard of the law as set out in *Bryant*, even after Rosenbaum cited the case when requesting payment. The release, the court held, does not justify Davis's actions. Second, Davis clearly had the money to pay fees. Third, this award would deter future similar conduct. Fourth, this litigation has resolved key legal questions regarding the distribution of assets, and all the participants will be benefitted by the result. Finally, the court held that Rosenbaum's legal position is far more meritorious than Davis's.

Davis contends that the court abused its discretion by not considering, when deciding that Davis acted in bad faith, the confusing and unsettled state of the law concerning reversion issues. Davis can also not be accused of bad faith in relying on a general release of claims or in interpreting the agreement as excluding Rosenbaum as a

participant. Also, Davis argues that Rosenbaum did not seek to resolve important questions; he merely wanted to receive a windfall. In short, the issues in this case are too complex and the questions too close for fees to be awarded.

Even taking into account the abuse of discretion standard, we agree with Davis that fees should not have been awarded in this case. The issues in this case are unsettled enough that neither party can be said either to be acting with bad faith or to have an obviously more meritorious position than the other. We thus **REVERSE** and **VACATE** the award of attorney's fees. On all other issues, the judgment of the court below is **AFFIRMED**.

APPENDIX B

AMENDED MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed October 7, 1987)

(IRVING J. ROSENBAUM, Plaintiff and Counter-Defendant, vs. DAVIS IRON WORKS, INC., Defendant and Counter-Plaintiff, vs. SHELDON D. EIZEN; NATIONAL ADMINISTRATIVE SERVICES OF MICHIGAN, INC.; AUSTIN A. KANTER; AUSTIN A. KANTER, C.L.U. & ASSOCIATES, INC.; JACK L. ROSEN; and JACK L. ROSEN, P.C., Third-Party Defendants — CIVIL NO. 87-70200)

Plaintiff has filed this action to compel a pro rata distribution of residual assets of $63,868.00 to the participants in Defendant's pension plan as of its termination date of October 5, 1984. This Court has subject matter jurisdiction pursuant to 29 U.S.C. § 1132. On July 20, 1987, a hearing was held on Plaintiff's motion for summary judgment on the complaint and to dismiss Defendant's counterclaim. The Court granted Plaintiff's motion in its entirety for reasons herein described. This memorandum represents the Court's findings of fact and conclusions of law in support of the ruling announced at the hearing.

FINDINGS OF FACT

The facts of this case are not in dispute.

Defendant Davis Iron Works, Inc. is a Michigan corporation which provides fabricated steel components to

general contractors in the building industry in metropolitan Detroit. From the early 1960s until his resignation on June 8, 1984, Plaintiff Irving J. Rosenbaum was the majority shareholder and the president of Davis.

In 1967, Defendant established the Davis Iron Works, Inc. Pension Trust ("Trust") to cover its eligible non-union employees. The Trust was submitted to the Internal Revenue Service on December 28, 1968 and received a favorable determination as a "qualified pension plan" under the Revenue Act of 1954, 26 U.S.C. § 401(a).

Under the 1967 Trust, Defendant agreed to purchase annuity contracts on the eligible employees which would create a monthly pension upon the employee's retirement. The relevant provisions of the Trust are as follows:

> 7.4 All amounts contributed by the Employer to the Trustee shall represent irrevocable contributions of the Employer to this Trust.
>
> * * *
>
> 12.1 The Employer by action of its Board of Directors may amend this trust at any time, or from time to time, as evidenced by an instrument in writing executed in the name of the Employer by a duly authorized officer under the corporate seal of the Employer provided, however:
>
> * * *
>
> (b) No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries.

> (c) No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer.
>
> * * *
>
> 12.4 Upon termination of the trust any assets of the trust, other than contracts issued on the lives of participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants.

The 1967 Trust was amended and reframed in its entirety on June 1, 1979 to comply with the provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The 1979 Trust deleted the above-quoted paragraphs of the 1967 Trust and replaced them with the following provisions:

> 22.2 (E) In the event there are assets of the Trust Fund remaining after the allocation under Subsection 22.2(D), the remaining assets shall be returned to the Corporation.
>
> * * *
>
> 24.1 *Exclusive Benefit.* Except as otherwise specifically provided herein, under no circumstances shall any funds contributed to this Trust or any assets of this Trust ever revert to, or be used or enjoyed by the Corporation, nor shall any such funds or assets ever be used other than for the benefit of Employees of the Corporation hereunder or their Beneficiaries, and for defraying reasonable expenses of administering the Plan and Trust.

In addition, paragraph 3.2 designated Davis as the Trust's Administrator. Plaintiff continued as the Trustee.

On June 8, 1984, Plaintiff resigned as president and director of Davis and as trustee of the Trust. A Stock Redemption Agreement was executed whereby Defendant purchased all of Plaintiff's shares in the company. On the date of the redemption, the parties also executed a mutual release concerning the stock transaction.

Plaintiff's accrued and vested benefits in the Trust were calculated upon his retirement from Defendant. Pursuant to the terms of the Trust, Plaintiff elected to have the actuarial equivalent of his accrued benefits transferred to a separate account within the Trust to be held by the Trust until he decided to withdraw them. Said benefits were to be invested and to earn interest attributable to Plaintiff's account.

On October 5, 1984, Defendant terminated the Trust. On March 24, 1985, before the benefits were paid to the participants, Defendant notified Plaintiff that due to errors made by the actuaries, the Trust had miscalculated his benefit and that $65,324.00 being held in his segregated account would have to be returned to the general Trust. A dispute arose between the parties as to the computation of the correct amount to be returned. On November 1, 1985 Plaintiff, Defendant and the Trust entered into an Agreement to allocate the assets and interest that would constitute Plaintiff's accrued benefits from the Trust. The Trust paid Plaintiff his pension benefits.

After payment of all benefits and the expenses of terminating the Trust, an overfunding resulted in residual assets of $63,868.00. Plaintiff was promptly advised of this fact and demanded 75% (the percentage of his stock which was redeemed) of those residual assets. However, pursuant to paragraph 22.2(E) of the 1979

Trust, the excess assets were returned to Defendant. It is this surplus of assets that is in issue in the present litigation.

CONCLUSIONS OF LAW

PLAINTIFF'S COMPLAINT

On January 22, 1987 Plaintiff filed this lawsuit against Defendant Davis Iron Works, Inc. to compel a pro rata distribution of residual assets of $63,868.00 to the participants in Defendant's pension plan as of its termination date of October 5, 1984. The complaint alleges that Defendant failed to exercise reasonable care in determining the amount of surplus and in drafting an amendment to the Trust that would eliminate the surplus by increasing the benefits of the participants. In addition to distribution of the residual assets, Plaintiff requests costs, interest and attorneys fees.

In its answer to the complaint, Defendant argues that Plaintiff lacks standing to maintain this action under 29 U.S.C. § 1132 because he was not a participant of the Davis Iron Works, Inc. Pension Trust when the lawsuit was filed Defendant further argues that the transfer of Plaintiff's accrued benefits to a separate account was equivalent to a constructive lump-sum distribution within the intent and policy considerations of ERISA's definition of "participant." The Court finds both of these arguments to be without merit and unsupported by the evidence.

The terms of ERISA are enforceable through a civil action brought by the Secretary of Labor or a participant, beneficiary or fiduciary of a pension plan. 29 U.S.C. § 1132(a). The term "participant" is defined as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

There is no question that Plaintiff was a "participant" in Defendant's pension plan within the meaning of 29 U.S.C. §§ 1132(a) and 1002(7). On October 5, 1984, the date the Trust was terminated, Plaintiff was a "former employee . . . eligible to receive a benefit." He continued to be a participant until November 1, 1985, when he and the other four participants received their accrued benefits from the Trust.

Defendant's argument that Plaintiff's "participant" status ceased upon transfer of his benefits to a separate account is defeated by the following corporate documents *prepared by or on behalf of the Defendant:* a Summary Annual Report for the Trust which specifically states that five persons, including Plaintiff, were participants in the Trust at the end of the plan year, December 24 1985; and the 1984 Form 5500-C and attached Schedule SSA filed on January 31, 1986 with the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation to terminate the Trust, which designated Plaintiff as a participant for the plan year ending September 20 [*sic,* 30], 1985. Therefore, Plaintiff does have standing to maintain the present action to recover his pro rata share of the residual assets to which he was entitled as a plan participant.

Defendant argues that Plaintiff is barred from maintaining this action to recover the residual assets because he clearly and unambiguously released all of his claims against the Trust and the Defendant company pursuant to a Mutual General Release dated June 8, 1984 and/or a subsequent Agreement dated November 1, 1985. The Court finds that Defendant's argument must fail as a matter of federal and state law.

Subject to limited exceptions not applicable here, ERISA provides that:

> any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, cr duty under this part shall be void as against public policy.

29 U.S.C. § 1110(a). Plaintiff correctly states the general purpose of this section: to prevent plan fiduciaries from coercing a settlement agreement from an employee and then using the release to prevent judicial review of the agreement. Thus, if this Court were to accept Defendant's characterization of the foregoing documents as releasing Defendant and the Trust from liability, then these releases must be declared void as against public policy under federal law.

Even in the absence of federal law, neither document would bar Plaintiff's cause of action under state law. A release covers only the claims intended by the parties to be released. *Harris* v. *Lopeer* [*sic,* Lapeer] *Public School System,* 114 Mich. App. 107 (1982).

The Mutual General Release was executed on June 8, 1984 between Plaintiff and Defendant in conjunction with the Stock Redemption Agreement of the same date. The Trust, by its trustee or administrator, was not even a

party to the release. This document only released the Defendant with respect to claims arising out of Plaintiff's majority ownership of stock in, and his employment by, the Defendant company. Quite clearly, any claims arising out of the Trust were neither contemplated nor covered by the release given, since the reversion to Defendant of the residual assets did not occur until December of 1985.

The Agreement dated November 1, 1985 was executed by the parties, including the Trust, to resolve a dispute regarding the allocation of assets and interest that would constitute Plaintiff's accrued benefits from the Trust. Paragraph 14 of the Agreement released Defendant, the Trust and its fiduciaries from any and all liability claims Plaintiff has or "may hereafter have" against the Trust.

To the extent that Plaintiff agreed to release Defendant from all *future* claims in exchange for his vested accrued benefits, the release would be without consideration. A promise to perform a legal contractual obligation does not constitute sufficient consideration for a contractual promise (*i.e.*, release) from the other party. *Ruffin* v. *Mercury Record Publications, Inc.*, 573 [*sic*, 513] F.2d 222 (6th Cir. 1975), *cert. denied*, 423 U.S. 914 (1976). Moreover, a release is limited only to claims that could have been in existence at the time of the execution under current state law. *Auto-Owners Insur. Co.* v. *Higby*, 57 Mich. App. 604 (1975). On November 1, 1985, when the release was executed, Plaintiff's cause of action as to the reversion had not yet accrued; that did not occur until December 24, 1985.

Clearly, the release contained in the Agreement of November 1, 1985 does not bar Plaintiff's present action to recover his pro rata share of the residual assets. To the contrary, the Agreement created an explicit exception to

the release: Plaintiff maintained his claim to an increase in the purchase price of his stock redeemed by Defendant "by reason of the reversion of Trust funds to [Defendant] upon termination and liquidation of the Trust." Therefore, neither of the two releases relied upon by Defendant operates as a bar to the instant proceedings.

Defendant argues that the 1979 amended Trust properly permitted a reversion of the residual assets of the pension plan to the Defendant upon termination of the Trust. Plaintiff counter-argues that under the law in this jurisdiction, the Trust amendment providing for the reversion is null and void, and therefore, Defendant is required to return the residual assets to the Trust for distribution to the plan participants.

Under ERISA, any residual assets of a single-employer plan may be distributed to the employer if the plan so provides. 29 U.S.C. § 1344(d)(1). To determine whether the Davis Iron Works, Inc. Pension Trust provides for such a distribution in the case at bar, the Court must review the relevant provisions of the original 1967 Trust. Amendments to the Trust were permitted subject to the following exceptions. Paragraph 12.1(b) forbade any amendment that provided for the use of trust funds for any purpose other than for the participants. Paragraph 12.1(c) unequivocally stated that no funds contributed to the trust or assets of the trust shall ever revert to the employer. And paragraph 12.4 required that on termination of the plan, excess assets were to be distributed pro rata among the participants.

The 1979 amended Trust deleted the foregoing paragraphs and inserted paragraph 22.2(E), which provided that upon termination of the Trust, all residual assets would revert to the Defendant company.

The issue presently before the Court is whether an employer may properly amend an employee benefit plan to provide for a reversion of residual assets to that employer upon termination of the plan. This issue was recently addressed by the Sixth Circuit Court of Appeals in *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), a case factually similar to the one at bar. In *Bryant*, the defendant-employer created a benefit plan in 1959 which qualified under 26 U.S.C. § 401(a)(2). Sections 5.3 and 13.1, respectively, of the 1959 Plan contained an absolute prohibition that no contributions, assets or income from the plan could ever revert to the employer and no amendment could be enacted to cause such a reversion. To conform with the requirements of ERISA, the employer amended and restated the plan in 1976, and omitted the anti-reversion sections of the 1959 Plan. In 1982, the plan was amended again to add a new provision to section 11.2 which provided that any excess assets remaining as a result of actuarial error would revert to the employer. Upon termination of the plan, $139,000.00 was returned to the employer.

The *Bryant* plaintiffs, who were participants in the plan at the time of its termination, brought suit to compel distribution of the excess assets to themselves. The United States District Court for the Southern District of Ohio entered judgment for the employer. The Sixth Circuit Court of Appeals reversed and remanded the case to the district court to equitably distribute the excess funds to the plan participants. In reaching its decision, the appeals court principally relied upon Section 5.3 of the 1959 Plan that prohibited any reversion to the employer:

> In no event and under no circumstances shall any *contributions* to this Trust by the Employer, nor

> any of the Trust Estate or the income therefrom revert to or be repaid to the Employer.

Bryant, 793 F.2d at 122 (emphasis added). The court concluded that "[e]ven if a surplus from actuarial error might properly be considered not to be part of the trust estate, nevertheless, the surplus assets did originate as 'contributions' to the trust." *Id.* at 123. Accordingly, the reversion amendment was voided by the court.

In determining the validity of the trust amendment in this case, the Court is bound by the Sixth Circuit precedent established in *Bryant*. Paragraph 12.1(c) of the 1967 Davis Trust states:

> No funds *contributed* to this trust nor assets of this trust shall ever revert to or be made available to the Employer.

(Emphasis added.) This language is absolute and precludes the post-ERISA amendment to the Trust adopted in 1979 to provide for a reversion of assets to Defendant. Therefore, said amendment is null and void.

Defendant attempts to distinguish paragraph 12.1(c) of the Davis Trust from *Bryant* by noting the absence of the words "no amendment" or "in no event and under no circumstances" from the beginning of that subparagraph. This distinction is disingenuous for several reasons. First, Defendant fails to acknowledge that paragraph 12.1 is part of Article XII entitled "Amendment and Termination." The four subparagraphs, including 12.1(c), list the amendments which are *not* permitted. Second, paragraph 5.3 of the *Bryant* plan did not even use the word "amendment." Instead, that court relied upon the word "contribution" coupled with the absolute prohibition against a reversion to the employer to void that amendment. The language of paragraph 12.1(c) of the 1967 Trust falls squarely within *Bryant*.

Defendant's reliance on *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987) is misplaced. The *Wilson* case is factually distinguishable from the instant case. There, the defendant-employer created a defined benefit plan in 1951 for eligible employees. The 1951 Plan provided that pension fund assets were for the exclusive benefit of the employees and could not be withdrawn "either by the voluntary act of the Company . . . or otherwise." In 1973, the Plan was amended to expressly provide that any residual assets would be distributed to the employer upon termination of the Plan. The Plan was terminated in 1985 and $14.5 million of residual assets were distributed to the employer.

The *Wilson* plaintiffs, who were employees, surviving spouses or estates with vested pension rights, filed a class action seeking distribution of the residual assets to themselves. The United States District Court for the Southern District of West Virginia entered summary judgment for the employer and other named defendants on the grounds that the 1951 Plan did not bar the residual assets amendment.

On appeal, the Fourth Circuit Court of Appeals affirmed the district court. The critical difference noted by the appeals court that distinguished *Wilson* from *Bryant* was as follows: While the nondiversion provision of the 1951 Plan in *Wilson* arguably barred amendments resulting in a withdrawal or transfer from the "Fund" (*i.e.*, "by the voluntary act of the Company . . . or otherwise"), the nonreversion provision in *Bryant* went much farther by providing that "[i]n no event and under no circumstances shall any *contribution* . . . be *repaid* to the Employer" (emphasis added).

The Davis Trust presently in issue specifically refers to the return of "contributions" to the employer; it does

not generally prohibit withdrawals from the "Fund". Accordingly, *Bryant* is the controlling case.

Even if *Wilson* were factually similar to the case at bar, which it is not, this Court is bound to follow the Sixth Circuit precedent established in *Bryant* and not the Fourth Circuit's opinion in *Wilson*.

Defendant argues that Plaintiff is estopped from maintaining this action because Plaintiff was the president of and a majority shareholder in Davis Iron Works, Inc. at the time the 1979 amended Trust was adopted and should not receive any benefits as a result of the nullification of the amendment regarding reversion of assets.

The doctrine of estoppel is essentially based upon misrepresentation. Specifically, estoppel arises when one by his acts, representations or silence, intentionally or through culpable negligence, induces another person to believe in the existence of certain facts and that person justifiably relies on those facts to his detriment. *Bently v. Cam*, 362 Mich. 78 (1960); *Hastings Mutual Ins. Co. v. Hartford Accident & Indemnity Co.*, 134 Mich. App. 662 (1984). Defendant has failed to establish the requisite elements of estoppel.

Contrary to Defendant's assertion, the "wrongful act" which forms the basis of Plaintiff's cause of action is *not* the 1979 amendment to the Trust. Rather, it is the distribution of residual assets to the defendant-employer. Plaintiff was no longer affiliated with Defendant at the time Defendant made the decision to claim the reversion.

The Trust was amended in 1979 to conform with the requirements of ERISA. Defendant has never claimed that Plaintiff intended to mislead or even injure the Defendant by passage of the 1979 amendment which,

incidentally, was drafted on behalf of and in the best interests of the Defendant. At the time of its adoption, all parties involved believed the amendment was valid. Said amendment did not become null and void until the Sixth Circuit's decision in *Bryant* was issued in 1986. Furthermore, Defendant did nothing in reliance on the amendment. The Trust was terminated *prior to* Defendant's discovery that a surplus even existed. This Court's nullification of that amendment results in no damage, loss or prejudice to the Defendant but merely denies Defendant a windfall of assets that it once contributed to the Trust, and was not entitled to reclaim. Therefore, the residual assets must be returned to the Trust for distribution to the plan participants. *Bryant, supra.*

Having granted Plaintiff's motion for summary judgment on the complaint and having determined that the 1979 amendment to the Trust is null and void, Plaintiff is entitled to a proportionate allocation of the surplus assets.

The formula for allocating residual assets in a pension plan which does not provide for a reversion to the employer is set forth in the Internal Revenue Service Regulations at 29 C.F.R. § 2618.32(a). The total value of residual assets ($63,868.00) is to be multiplied by the participant's present value of his accrued benefits divided by the present value of *all* accrued benefits of the participants ($289,767.43/$422,222.00). Application of the formula to the facts of this case reveals that Plaintiff is entitled to $43,832.07 of the reversion. There is no dispute as to the numbers to be inserted into the formula. Furthermore, this formula is consistent with paragraph 12.4 of the 1967 Trust that requires all surplus assets to be distributed to the participants in proportion to their benefits.

Defendant argues that Plaintiff is not entitled to share in the reversion, even if successful, because he was not an "active" participant when the Trust was terminated. This argument must fail for several reasons. First, Defendant cites no authority whatsoever to support its proposition. Second, Plaintiff is within the "pool of eligible participants", as defined by I.R.S. Regulations, entitled to benefits as of the date the plan assets were to be distributed. *See* 29 C.F.R. § 2618.2.

In addition to his $43,832.07 share of the residual assets, Plaintiff is entitled to prejudgment interest on that amount from the date of December 25, 1985, the date that Defendant refused to allocate the assets among the participants. *Short* v. *Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984). The interest rate is to be determined under 28 U.S.C. § 1961(a).

Pursuant to 29 U.S.C. § 1132(g), the Court also will grant Plaintiff's reasonable request for attorneys fees and deny Defendant's counter-request for the same.

Defendant correctly notes that the appropriate guidelines under which a district court may exercise its discretion and award attorneys fees under ERISA were articulated in *Central States Pension Fund* v. *888 Corporation*, 813 F.2d 760, 767 (6th Cir. 1987):

(1) The degree of the opposing party's culpable or bad faith;

(2) The ability of the opposing party to satisfy an award of attorneys fees;

(3) Whether the party requesting fees against the opposing party would deter others from acting in similar circumstances;

(4) Whether the party requesting fees sought to benefit all participants and beneficiaries of a multi employer plan or to resolve a significant legal question; and

(5) The relative merits of the parties' positions. *See also Thomas* v. *Marshall,* 482 F. Supp. 160 (S.D. Ala. 1979).

Application of these guidelines to the facts of this case reveals that Plaintiff, and not Defendant, is entitled to recover attorneys fees under the circumstances of this case. First, prior to instituting this litigation, Plaintiff requested that Defendant return the residual assets to the Fund in light of the *Bryant* decision. Defendant's refusal to do so was totally unjustified in the law. Plaintiff's execution of releases with respect to the stock agreement does not bar Plaintiff's action or overshadow Defendant's intransigence. Second, Defendant fails to argue it would be unable to pay any amount requested by Plaintiff. Third, such an award would deter other employers from similar conduct, and is fully justified by the quantity and quality of legal work required to be performed. Fourth, the amount of benefits to be transferred back to the Trust is significant: $63,868.00. Entering summary judgment for Plaintiff will benefit him *and* the four remaining participants entitled to receive those residual assets. This litigation has resolved a significant legal question regarding the proper amendment of pension plans to provide for a reversion of assets to the employer upon termination of the plan. Finally, Plaintiff's legal position in these proceedings was by far more meritorious than that of Defendant. Therefore, an award of attorneys fees for Plaintiff will be entered accordingly upon submission of an affidavit to the Court substantiating the hours expended with respect to this litigation.

DEFENDANT'S COUNTERCLAIM

On February 13, 1987, Defendant filed a three-count counterclaim against Plaintiff. Counts I and II seek damages for breach of fiduciary duty under ERISA. Count III is a state law claim for contractual indemnity. Plaintiff requests dismissal of the foregoing causes of action.

The Court must dismiss Counts I and II of Defendant's counterclaim based on breach of fiduciary duty. A cause of action for breach of fiduciary duty is governed by 29 U.S.C. § 1109:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan *any losses* to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Emphasis added.) Persons entitled to sue for breach of fiduciary duty are limited to the Secretary of Labor, or a participant, beneficiary or fiduciary of the pension plan. 29 U.S.C. § 1132(a)(2).

Defendant's designation as "Administrator" of the Trust does not qualify Defendant as a "fiduciary" unless Defendant is suing in its administrative capacity on behalf of Plaintiff or other plan participants. Here, the counterclaim is brought by Defendant in its capacity as an "employer" and for *its* sole benefit. An employer is not entitled to maintain a civil action under ERISA against a fiduciary for breach of fiduciary duty. "Permitting recovery by employers for damages allegedly caused by trust mismanagement would deplete the Funds' assets and thus hinder the achievement of a primary goal of ERISA, protection of the interests of participants in employee benefit plans and their beneficiaries." *Central States, Southeast and Southwest Areas Pension Fund* v. *Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 47 (D. Minn. 1980), *aff'd*, 642 F.2d 1122 (8th Cir. 1981).

In addition, Defendant has failed to allege, as required by 29 U.S.C. § 1109, that the Trust suffered a loss or that Plaintiff made a profit through the use of plan assets as a result of the reversion amendment adopted in 1979. Therefore, the Court finds that Defendant lacks standing under ERISA to counterclaim against Plaintiff for breach of fiduciary duty. Counts I and II are hereby dismissed.

Even if Defendant had standing to maintain its cause of action for breach of fiduciary duty, said action would be barred by the applicable statute of limitations, which provides:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, *after the earlier of* —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added).

In the instant case, the date of the last action by Defendant which allegedly constituted the breach (*i.e.*, enactment of the amended Trust) was June 1, 1979. Six years from that date was June 1, 1985. Alternatively, the date Defendant had actual knowledge of the breach was when Defendant was informed of the *Bryant* decision: December of 1986. Three years from that date is December of 1989. Defendant is statutorily required to file suit by the earlier of these two dates — July 1, 1985. Since its counterclaim was not filed until February 13, 1987, Count I and II would be barred by the statute of limitations.

Defendant's argument that its counterclaim is not barred because the statute of limitations did not begin to run until June 8, 1984, the last date on which Plaintiff as the Trust's fiduciary could have cured the reversion

amendment, is totally without merit. Contrary to Defendant's assertion, Plaintiff's failure to amend the Trust prior to his resignation as a trustee and termination of his employment with Defendant on June 8, 1984 does not constitute an "omission" within the meaning of 29 U.S.C. § 1113(1)(B). As the Court has previously noted, the amendment was valid until the *Bryant* decision was rendered by the Sixth Circuit in 1986. Thus, in 1984, there was no error for which Plaintiff was obligated to "correct."

Similarly, the Court must dismiss Count III of the counterclaim for contractual indemnification under the Stock Redemption Agreement for assets Defendant is required to return to the Trust.

The Stock Redemption Agreement, dated June 8, 1984, provides:

> 4.1 Rosenbaum shall indemnify the Company for 75% of the cost to the Company following reduction of income tax, if any, of any liability that the Company incurs as a result of a breach of any of the representations or warranties made by him in Article III.
>
> 4.2 Notwithstanding paragraph 4.1, Rosenbaum shall indemnify the Company for 75% of the cost to the Company following reduction of income tax, if any, of any liability that accrues prior to December 31, 1983 and for which there is insurance coverage, to the extent that the Company's liability exceeds the applicable insurance coverage.

Paragraph 4.1 is inapplicable because none of the warranties and representations made in Article III relates to the Trust. The "liability" Defendant seeks indemnifica-

tion on did not even become contingent until this lawsuit was filed on January 22, 1987. Paragraph 4.2 also is not applicable because Defendant's "liability" to the Trust for the amount of residual assets is not a liability for which there is insurance coverage and did not accrue before December 31, 1983. Since Plaintiff made no warranties regarding the Trust and Defendant had no liability to Plaintiff until it took the reversion in December of 1985, Defendant is not entitled to indemnification under the Stock Redemption Agreement. Accordingly, Count III is dismissed.

For all the reasons stated in Plaintiff's briefs and on the record at the hearing of July 20, 1987;

IT IS ORDERED that Plaintiff's motion for summary judgment on the complaint and to dismiss Defendant's counterclaim be and hereby is GRANTED.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR
United States District Judge

Dated: October 7, 1987

APPENDIX C

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(IRVING J. ROSENBAUM, Plaintiff(s), -vs- DAVIS IRON WORKS, INC., Defendant(s), — Civil Action No. 87-70200)

This court having entered its Memorandum Opinion and Order in the above-captioned cause, judgment is hereby entered for Plaintiff.

/s/ ANNA DIGGS TAYLOR
United States District Judge

Dated: September 21, 1987

APPENDIX D

ORDER DETERMINING AMOUNT OF ATTORNEY FEE AWARD

(United States District Court — Eastern District of Michigan — Southern Division)

(December 7, 1987)

(IRVING J. ROSENBAUM, Plaintiff and Counter-Defendant, -vs- DAVIS IRON WORKS, INC., a Michigan corporation, Defendant, Counter-Plaintiff and Third-Party Plaintiff, -vs- SHELDON D. EIZEN, NATIONAL ADMINISTRATIVE SERVICES OF MICHIGAN, INC., a Michigan corporation, AUSTIN A. KANTER, AUSTIN A. KANTER, C.L.U. AND ASSOCIATES, INC., a Michigan corporation, JACK L. ROSEN, and JACK L. ROSEN, P.C., a Michigan professional corporation, jointly and severally, Third-Party Defendants — Case No. 87-CV-70200-DT; Hon. Anna Diggs Taylor)

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on __________.

PRESENT: HON. ________________,
U.S. DISTRICT COURT JUDGE.

This matter having come before the Court on Plaintiff's motion for an order determining the amount of the attorney fees that were originally awarded to Plaintiff pursuant to a Memorandum Opinion and Order dated September 21, 1987; Defendant having filed a response to the motion; the parties having orally argued the motion before the Court, and the Court being more fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant DAVIS IRON WORKS, INC. shall pay to Plaintiff IRVING J. ROSENBAUM the sum of Nine Thousand Eight Hundred Sixty Two and 50/100 ($9,862.50) Dollars as attorney fees pursuant to 29 U.S.C. § 1132(g).

/s/ __________________________

U.S. DISTRICT COURT JUDGE